

Federal Communications Commission

DA 03-357

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Petition of Cavalier Telephone, LLC)	WC Docket No. 02-359
Pursuant to Section 252(e)(5) of the)	
Communications Act for Preemption)	
of the Jurisdiction of the Virginia State)	
Corporation Commission Regarding)	
Interconnection Disputes with Verizon)	
Virginia, Inc. and for Arbitration)	

MEMORANDUM OPINION AND ORDER

Adopted: February 4, 2003

Released: February 4, 2003

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION AND BACKGROUND

1. This *Memorandum Opinion and Order* addresses the petition of Cavalier Telephone, LLC (Cavalier) for preemption of the jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to the arbitration of an interconnection agreement with Verizon-Virginia, Inc. (Verizon).¹ Specifically, Cavalier seeks preemption of the jurisdiction of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act).² For the reasons set forth below, we grant Cavalier's petition.

2. Section 252 of the Act sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier.³ Section 252(b) permits a party negotiating an interconnection agreement to petition the relevant state commission to arbitrate any open issues.⁴

¹ *Petition of Cavalier Telephone, LLC. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration*, WC Docket No. 02-359 (filed November 7, 2002) (Cavalier Preemption Petition); see *Pleading Cycle Established for Comments on Petition of Cavalier Telephone, LLC for Preemption Pursuant to Section 252(e)(5)*, WC Docket No. 02-359, Public Notice, DA 02-3152 (rel. November 14, 2002).

² 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.*

³ See generally 47 U.S.C. § 252.

⁴ 47 U.S.C. § 252(b).

Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under section 252.⁵

3. On August 14, 2002, Cavalier filed a petition with the Virginia Commission seeking arbitration under the Act and the Virginia Commission’s rules of unresolved issues in Cavalier’s interconnection agreement negotiations with Verizon.⁶ On October 11, 2002, the Virginia Commission issued an Order of Dismissal, declining to arbitrate the issues under the Act so that Cavalier and Verizon may proceed before this Commission.⁷ Specifically, the Virginia Commission quoted its holding in a prior case:⁸

[U]ntil the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act’s federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth’s immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers?

4. Unlike its approach in prior cases,¹⁰ the Virginia Commission did not provide the parties the opportunity to proceed solely under Virginia law, stating in its Order of Dismissal that

⁵ 47 U.S.C. § 252(e)(5). See, e.g., *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277 (2000) (*Starpower Preemption Order*).

⁶ *Petition of Cavalier Telephone LLC, for Arbitration with Verizon Virginia, Inc. Pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Case No. PUC-2002-00171 (filed Aug. 14, 2002) (*Virginia Petition*).

⁷ *Petition of Cavalier Telephone LLC, for Arbitration with Verizon Virginia, Inc. Pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Case No. PUC-2002-00171, Order of Dismissal at 5 (Oct. 11, 2002) (*Order of Dismissal*).

⁸ See *Application of AT&T Communications of Virginia, Inc., et al., for Arbitration with Verizon Virginia*, Case No. PUC-2000-00282, Order of Dismissal at 5 (Dec. 20, 2000) (*AT&T Dismissal Order*).

⁹ *Order of Dismissal* at 3.

¹⁰ See e.g., *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001) (discussing the Virginia Commission’s Sept. 13, 2000 Order in the case brought by Worldcom, Inc.) (*WorldCom Preemption Order*); see also, *Petition of Global NAPs South, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc.*, WC Docket No. 02-180, Memorandum Opinion and Order, DA 02-2300 (Wireline Comp. Bur. rel. Sept. 17, 2002) (discussing the Virginia Commission’s February 20, 2002 Preliminary Order granting parties 15 days to file a petition under state law in the case brought by Global NAPs) (*Global NAPs Preemption Order*).

“[t]his Commission will not arbitrate the interconnection issues for the reasons set forth in the findings above.””

5. Cavalier filed the present Preemption Petition on November 7, 2002, requesting that this Commission preempt the jurisdiction of the Virginia Commission over the arbitration of unresolved issues in Cavalier’s interconnection agreement negotiations with Verizon, and requesting that the Commission follow the same procedures, including a similar procedural schedule, that it had used to govern a prior arbitration.¹² In Comments filed in this proceeding on December 5, 2002, Verizon expressly did not oppose Cavalier’s petition.”

II. DISCUSSION

6. This petition involves virtually identical issues as those addressed by the Commission in the *WorldCom Preemption Order*,¹⁴ and more recently, the *Global NAPS Preemption Order*.” Accordingly, we grant Cavalier’s petition on the question of preemption and, pursuant to section 252(e)(5), assume the jurisdiction of the Virginia Commission over the interconnection arbitration proceeding between Cavalier and Verizon in Virginia. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission “fails to act to carry out its responsibility under [section 252].”¹⁶ Here, as in the WorldCom proceeding and several others,” the Virginia

¹¹ *Order of Dismissal* at 5.

¹² *Cavalier Preemption Petition* at 5-6. Cavalier specifically requests that we follow the procedures set forth in *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 16 FCC Rcd. 6231 (2001) (*Arbitration Procedures Order*); *Procedures Established For Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom*, CC Docket Nos. 00-218, 00-249, 00-251, Public Notice, DA 01-270 (rel. Feb. 1, 2001) (*AT&T/Cox/WorldCom Procedural Public Notice*).

¹³ Verizon Comments at 1.

¹⁴ See *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001) (*WorldCom Preemption Order*).

¹⁵ *Global NAPS Preemption Order*, n.10.

¹⁶ 47 U.S.C. § 252(e)(5). See also 47 C.F.R. § 51.801(b). The Commission has previously indicated that it will evaluate whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case. See, e.g., *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 8; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758-59, paras. 5, 33 (1997), recons. denied, 14 FCC Rcd 7024 (1999).

¹⁷ See *Order of Dismissal* at 3; *Petition of Global NAPS South, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia, Inc.*, Case No. PUC020001, *Order of Dismissal* at 1-2 (March 20, 2002); *Petition of MCI Metro Access Transmission Services of Virginia, Inc., et al., for Arbitration*, Case No. PUC000225, *Order*, at 1-2 (Sept. 13, 2000).

Commission expressly refused to apply federal law, citing the uncertainty surrounding the availability of Eleventh Amendment immunity from federal appeal under the Act.¹⁸ In the *WorldCom Preemption Order*, the Commission concluded that, by insisting upon arbitration pursuant to state law rather than the requirements of the Act, the Virginia Commission failed to carry out its responsibilities under section 252.¹⁹ In this case, the Virginia Commission did not even offer to arbitrate under state law, dismissing Cavalier's Virginia Petition outright for the express purpose of enabling the parties to proceed before this Commission. Finally, Verizon does not dispute that the Virginia Commission did not carry out its section 252 responsibilities. Accordingly, based upon the same reasoning that the Commission applied in the *WorldCom Preemption Order*, we find that the Virginia Commission failed to carry out its section 252 responsibilities in this case, and we therefore preempt the jurisdiction of the Virginia Commission with respect to the interconnection arbitration proceeding between Cavalier and Verizon in Virginia pursuant to section 252(e)(5).

7. Cavalier may now petition the Commission for arbitration of the interconnection disputes that were the subject of the Virginia Commission proceeding addressed herein, which the Chief, Wireline Competition Bureau, would conduct in accordance with the Commission's *Arbitration Procedures Order*.²⁰ Prior to filing its Petition for Arbitration, Cavalier shall contact the Bureau to schedule a joint pre-filing conference.²¹ Parties should refer to the procedures established for the Commission's previous arbitration to determine what they should be prepared to discuss at the pre-filing conference.²² Once the pre-filing conference has been held, the Chief, Wireline Competition Bureau, will issue a public notice establishing procedures and a pleading

¹⁸ Federal judicial review is the sole remedy under the Act to seek recourse for state commission determinations concerning interconnection agreements. See 47 U.S.C. § 252(e)(4), (6). See also *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000) (state commissions waived sovereign immunity), *cert. denied*, 69 U.S.L.W. 3297 and 69 U.S.L.W. 3346 (U.S. Jan. 22, 2001) (mem.); *AT&T Communications, Inc. v. Bell South Telecommunications, Inc.*, 2001 WL 38281 (5th Cir. 2001) (state constructively waived sovereign immunity, and *Ex parte Young* doctrine allowed suit against commissioners); *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862 (6th Cir. 2000) (state sovereign immunity barred by *Ex parte Young* doctrine), *cert. denied*, 121 S.Ct. 54 (2000) (mem.); *MCI Corp. v. Public Service Commission of Utah*, 216 F.3d 929 (10th Cir. 2000) (state constructively waived sovereign immunity, and *Ex parte Young* doctrine allowed suit against commissioners); *MCI Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000) (same).

¹⁹ See *WorldCom Preemption Order* 16 FCC Rcd at 6225-27, paras. 4-5.

²⁰ The Commission delegated to the Chief, Wireline Competition Bureau, authority to conduct such arbitrations. See 47 U.S.C. § 155(c)(1); 47 C.F.R. § 51.807(d); see also *Arbitration Procedures Order*, 16 FCC Rcd. at 6233, para. 8. Any filings made by Cavalier must meet the requirements of the *Arbitration Procedures Order* and the Commission's rules governing filing of petitions for arbitration. See 47 C.F.R. §§ 51.801 et seq.

²¹ For purposes of the initial contact, the parties shall contact John Stanley, Wireline Competition Bureau, at 202-418-1496.

²² See *AT&T/Cox/WorldCom Procedural Public Notice* at para. A.1 (discussing the pre-filing conference).

schedule specific to the upcoming Cavalier/Verizon arbitration proceeding.²³ Parties shall also be prepared to file the Petition for Arbitration no more than 30 days after the pre-filing conference.

8. Finally, we reiterate the finding in the *Local Competition Order* that the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(e)(5).²⁴ Similarly, any findings made by the Commission after it assumes responsibility over a proceeding, and any judicial review of such findings, shall be the exclusive remedies available to the parties.”

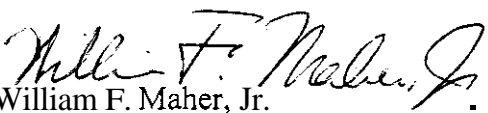
III. CONCLUSION

9. For the foregoing reasons, we grant Cavalier’s petition and preempt jurisdiction of the Virginia Commission over the arbitration of unresolved interconnection agreement issues with Verizon in Virginia.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and sections 0.91, 0.291 and 51.801(b) of the Commission’s rules, 47 U.S.C. § 252 and 47 C.F.R. §§ 0.91, 0.291 and 51.801(b), the Petition for Commission preemption of jurisdiction filed by Cavalier Telephone, LLC, on November 7, 2002, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Maher, Jr.

Chief, Wireline Competition Bureau

²³ We anticipate that the procedures and pleading schedule, including the contents of the Petition for Arbitration, will be similar to those set forth in the *AT&T/Cox/WorldCom Procedural Public Notice*. We may, however, modify these requirements or other aspects of the procedures based on discussions at the pre-filing conference.

²⁴ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16129, para. 1289 (1996) (*Local Competition Order*) (subsequent history omitted).

²⁵ See 47 U.S.C. § 252(e)(6).